Supreme Court of the United States

October Term, 1960

No. [illegible]

[illegible] INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO, [illegible]
ETAL, Petitioners

[illegible] NATIONAL LABOR RELATIONS BOARD,
[illegible] ELECTRIC PRODUCTS CORP.
IMPERIAL SWITCHBOARD, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1960

No.

LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and its Agent, JULIUS HELFER,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, LEXINGTON ELECTRIC PRODUCTS CO., INC. and IMPERIAL SWITCHBOARD, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Third Circuit entered in the above entitled case on December 9, 1960.

Opinion Below

The opinion of the United States Court of Appeals for the Third Circuit enforcing, as modified, the order of the National Labor Relations Board dated October 28, 1959 is reported in 283 Fed. (2d) 54, and printed in the Appendix to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

1. Whether a labor union may lawfully strike to compel an employer with which it has a collective bargaining agreement to shut down its newly-established plant, where the employer was vitiating said collective bargaining agreement and using the new plant as a partial "runaway shop" by transferring work to the new plant in violation of said collective bargaining agreement.

2. Whether the unprecedented decree by the United States Court of Appeals for the Third Circuit imposing primary liability upon a labor union for back pay to employees following a strike and plant shut-down, and only secondary liability upon the employer, was a proper and justifiable innovation in labor relations procedure.

3. Whether the unprecedented decree by the United States Court of Appeals for the Third Circuit ordering an employer and a labor union to suspend enforcement of the valid union-security clause of their collective bargaining agreement as against certain named employees, was a proper and justifiable innovation in labor relations procedure.

4. Whether the unprecedented decree by the United States Court of Appeals for the Third Circuit has, in the following respects, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision:

(a) The United States Court of Appeals, in arriving at its decision to enforce and modify the order of the National Labor Relations Board failed, as evidenced by its opinion, to base its decision upon "the record considered as a whole" in clear violation of the National Labor Relations Act as amended, as interpreted by this Court.

(b) The United States Court of Appeals, in its evaluation of the record, gave no consideration, as evidenced by

its opinion, to the collective bargaining agreement upon which the labor union primarily relied as justification for its acts.

(c) The United States Court of Appeals, failed in its opinion to state which, if any, of the two provisions of the National Labor Relations Act which the National Labor Relations Board claims that the labor union violated, had in fact been violated by the union, and thereby deprived the union of an opportunity to show this Court that the decision of the United States Court of Appeals, in its construction of the National Labor Relations Act, was in direct contradiction to the decisions of this Court.

(d) The United States Court of Appeals is seeking in its decree to enforce remedies hereinabove set forth in "2" and "3" for which no precedent exists, and which are improper and unjustifiable.

Constitutional Provision Involved

The Constitutional provision involved is the Fifth Amendment to the Constitution of the United States, which provides, in relevant part: "No person shall * * * be deprived of life, liberty or property, without due process of law; * * *."

Statement

Background

This case involves a labor union (Local 3, International Brotherhood of Electrical Workers, AFL-CIO, with some 32,000 members, hereinafter referred to as "Local 3") and an employer (Lexington Electric Products Co., Inc., hereinafter referred to as "Lexington", a manufacturer of electrical switchboards and control panels) which had in 1957 been in continuous collective bargaining relationship for more than twenty-five years.

Included in the collective bargaining agreement then in effect was the following clause:

> "27. The Employer agrees not to move its manufacturing plant or any machinery used in connection with the manufacturing of electrical products, etc., from the geographical confines of New York City during the life of this Agreement" (J.A. 179a).

The contract under which Local 3 represented Lexington's employees was uniform throughout the electrical switchboard industry in the New York area, which consisted of eight companies. All of these companies maintained their plants and offices in New York City, except Lexington, whose plant was located in Newark, New Jersey, and its sales office located in New York City (J.A. 79a).

In May of 1957 Julius Helfer, Business Representative of Local 3, received a complaint from John Byers, shop steward employed at Lexington, that Lexington was opening a shop nearby which was to be named Imperial Switchboard, Inc. (hereinafter referred to as "Imperial") (J.A. 121a-122a). Helfer caused an extensive search of the area to be made. In June of 1957 an empty shop named Imperial was discovered in Union, New Jersey, eight miles from the Lexington plant (J.A. 148a-149a). Twice during that month Helfer met with Napoleon Tischler, President of Lexington, asked him to disclose his connections with Imperial, and warned him that if Lexington were to begin to operate Imperial that would constitute a breach of the collective bargaining agreement. Tischler denied knowledge of or interest in Imperial and referred Helfer to Irving V. Cole, the Secretary-Treasurer of Lexington (J.A. 122a-123a).

During June of 1957 Cole arranged to meet with Andrew J. Mulrain, Business Manager of Local 1159, IBEW, together with Daniel Burke, the Labor Relations Manager of Federal Pacific Electric Company, a manufacturer of

electrical products, which had in the recent past arranged to discontinue contractual relationship with Local 3 and had signed an agreement with Local 1159. On July 1, 1957 Imperial commenced operations (J.A. 61a, 111a-113a) with two employees (J.A. 21a). During July Helfer requested Cole on three separate occasions to disclose the nature of his interest in Imperial, one of these occasions being a grievance meeting held at the Lexington plant on July 20, 1957. At each conference Helfer warned Cole that if he were operating Imperial he was breaching the collective bargaining agreement between Lexington and Local 3. During each conversation Cole denied that he had any interest in Imperial (J.A. 84a-90a, 122a-125a).

During July and August of 1957 employees of Lexington complained to Helfer and Byers that they were losing work opportunities because work in process and equipment were being removed from Lexington to Imperial, some of it on Lexington's truck (J.A. 125a-126a, 151a-153a). All the work done at Imperial either had been removed from Lexington and completed at Imperial or was performed at Imperial instead of at Lexington. The number of employees at Imperial progressively increased from two in July to eighteen in October (J.A. 21a, 22a, 84a, 86a, 91a-92a).

At a grievance meeting held on August 13, 1957, Local 3's sixth protest to Lexington concerning Imperial's operation, Cole admitted that he was an adviser to Imperial and, finally, that he was one of Imeprial's four partners (J.A. 27a). During August three executives left Lexington's employ and entered Imperial's employ (J.A. 128a).

At the next grievance meeting, held on or about August 28, 1957, Helfer asked Cole to close Imperial. Cole refused and suggested an arrangement under which Napoleon Tischler would operate Lexington and he would operate Imperial himself (J.A. 90a, 128a, 129a). On September 21, 1957, Byers reported to Helfer additional complaints by

Lexington's employees (J.A. 129a-130a). On September 23, 1957, Helfer met with Lexington's Shop Committee. The Shop Committee reported that employees were required, over their objections, to load trucks with equipment on which they themselves had worked for transfer to Imperial. On September 24, 1957, Helfer met with the entire shop at the Lexington plant. The employees decided to walk out immediately, and all the men left the shop (J.A. 131a-132a). During this strike, which was at all time conducted in peaceful and orderly fashion and which lasted until October 17, 1957, only Lexington was struck and picketed. No picketing or strike activities were conducted against Imperial.

Imperial signed a collective bargaining agreement with Local 1159, which was dated October 4, 1957 (J.A. 186a *et seq.*). This contract, compared with the 1955 Local 3 contract (J.A. 169a *et seq.*) shows similar wage rates but a very substantial difference in other terms and conditions of employment. Under the Local 3 contract Lexington paid the sum of $2 per day, or $500 per year, for each employee, into an Annuity Fund, which amount was credited to the individual accounts of the employees (J.A. 179a-185a). Lexington had a record of delinquency of payments into this annuity Fund (J.A. 85a, 124a). Lexington had also paid an amount equal to 4% of its weekly payroll into a Pension and Hospitalization Fund. The Local 1159 contract did not provide for any Annuity Fund or Pension Fund payments (J.A. 186a *et seq.*).

The strike was settled on October 17, 1957. It was agreed that the Lexington employees were to be paid for time lost; the material previously transferred from Lexington and worked on at that time at Imperial was to be returned to Lexington; the Imperial employees and the Imperial machinery which could be used at Lexington were to be transferred from Imperial to Lexington and Imperial was to be shut down (J.A. 140a-141a, 157a-162a).

The NLRB Proceedings

The Complaint

Proceedings were had by the National Labor Relations Board against Lexington and Imperial and Local 3 and its agent Julius Helfer. With respect to Local 3 and Helfer the complaint issued by the General Counsel alleged:

"VII and VIII

"At various times between July 1, 1957 and October 18, 1957, precise dates unknown, respondent Union, by its officers, agents and representatives including its agent, Julius Helfer, demanded of respondent Lexington that respondents Lexington and Imperial shut down and discontinue operations of the Union, New Jersey plant and discharge their employees employed thereat * * * because the said employees were not members of respondent Union."

"IX

"On or about September 24, 1957, the production employees of respondent Lexington engaged in a strike and thereafter continued to engage in such strike until on or about October 18, 1957. * * *"

"XI

"Respondent Union and its officers, agents and representatives including its agent, Julius Helfer, authorized, conducted, led and ratified the aforesaid strike in implementation of the demands described above in paragraph VII hereof, and for the reasons described above in paragraph VIII hereof."

The Answer

Local 3 and its agent, Julius Helfer, denied that they demanded of Lexington that Lexington discharge Imperial's employees; denied that they conducted the strike of Lexington's employees because Imperial's employees were not members of Local 3; and denied that they had engaged in any unfair labor practices.

The NLRB's Findings

With respect to Local 3 Trial Examiner Thomas A. Ricci concluded in his Intermediate Report that Local 3 struck with the object of forcing the Imperial employees into Local 3 by the indirect method of forcing Lexington to shut down Imperial in order to force the Imperial employees to seek employment in electrical switchboard plants in New York City, all of which had contracts with Local 3, all in violation of Sections 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act, as amended. These findings and conclusions of the Trial Examiner were adopted by the NLRB *in toto* (J.A. 3a).

The NLRB's Order

With respect to Local 3, the NLRB ordered among other things, in its order dated October 28, 1959, and reported at 124 NLRB No. 191 (J.A. 3a-12a), that Local 3

> (1) Cease and desist from causing Lexington and Imperial (found by the NLRB to constitute a single employer), and any other employer, to discharge or discriminate against employees.
>
> (2) Notify Lexington and Imperial and the former Imperial employees, listed in Appendix A of the Order, that it has no objection to the employment of these employees by the Companies. Upon their reemployment at the Lexington plant, the union-security provisions of any agreement in effect at the Lexington plant must not be enforced as against any of these employees who receives employment for a period of two years commencing with the date of such employment of each employee.
>
> (3) Make whole the former Imperial employees for any loss of pay they may have suffered by reason of the discrimination against them, this liability being imposed jointly and severally against Local 3 and Lexington and Imperial (J.A. 3a-12a).

The NLRB's Enforcement Proceeding

The NLRB petitioned the United States Court of Appeals for the Third Circuit for enforcement of its order. The case was argued before the United States Court of Appeals on June 9, 1960. On September 29, 1960 the Court issued an opinion which upheld the order of the NLRB in all but two significant respects, the significant modifications being:

(1) the Court's decision that primary liability for employees' loss of wages should be imposed upon Local 3 alone, and Lexington held liable to make the employees whole only should the Union fail to do so. This decision the Court supported by its statement that "Lexington resisted the union's demands to the point of actually filing a formal charge of unfair labor practice against the union with the National Labor Relations Board, asserting that the strike had the very illegal objective which the Board, in the present proceeding, has now found." This statement by the Court is factually erroneous in that the charge which Lexington filed against Local 3 had no relation to the illegal objective which the Board found to be the purpose of the strike, nor any relation to the employees of Imperial at all, but was in fact a charge that Local 3's strike against Lexington was illegal because directed at Imperial, an alleged neutral employer, supposedly unrelated to the dispute between Local 3 and Lexington.

(2) the Court's decision, upon the authority of *Communication Workers of America, AFL-CIO* v. *N. L. R. B.*, 1960, 362 U. S. 479, that the Board's injunction against the coercion of "any other employer" be eliminated from its cease and desist order.

In its opinion, the United States Court of Appeals

(1) failed entirely to review most of the evidence favorable to the Union's position, stating "Evidence was introduced on both sides of this issue. We shall not analyze all of it. It will suffice to specify certain items which in our view show that the factual findings and conclusions of the trial examiner, as adopted by the Board, have an adequate evidentiary base. * * * These considerations persuade us that the Board's finding as to the object of the strike is supported by substantial evidence. While the items we have discussed are but part of a total record containing other evidence favorable to the union's position, the cited evidence is sufficient to sustain the Board's findings before a court, limited as we are in reviewing administrative fact finding." (*Infra*, pp. 22, 23).

(2) failed entirely to make any mention of the collective bargaining agreement between Local 3 and Lexington, which contract, Local 3 had argued, was its primary justification for its strike.

(3) failed entirely to make mention of either Section 8(b)(1)(A) or Section 8(b)(2) of the National Labor Relations Act, as amended—the two provisions of law which the NLRB found Local 3 to have violated, or any of the cases cited by Local 3 in support of its contention that its strike was not a violation of either of these provisions of law.

(4) upheld the "extraordinary feature of [the Board's] requirement" (*Infra*, p. 24)—the stipulation that the valid union-security clause in Lexington's collective bargaining agreement with Local 3 be suspended for two years after each Imperial employee is hired at Lexington with reference to such employee on the ground that this remedy should be recognized as within administrative discretion and should not be disturbed by a reviewing court.

On December 9, 1960, the United States Court of Appeals caused to be entered a decree enforcing as modified the order of the NLRB, in conformity with the Court's aforesaid Opinion.

Reasons for Granting the Writ

1. The United States Court of Appeals has decided an important question of Federal Law, which has not been, but should be, settled by this Court.

It is by now so well known as not to require documentation, that numerous employers have during the past decade moved all or part of their plant and equipment from areas where unions enforce a high wage level to areas where such unions do not exist. Absent a valid collective bargaining agreement which either binds the employer to the high wage area or at least requires that some provision be made for the employees who may be rendered jobless by the transfer of plant or equipment, little can be done to prevent an employer from heeding the siren song of a less militant union or of a community which has no labor union. If a labor union does have such a valid collective bargaining agreement, and it strikes to enforce the clauses designed to deter transfer of operations by the employer, and if such strike, when successful, may be declared to be an unfair labor practice by the NLRB and the Courts, and a United States Court of Appeals may then impose primary liability upon the striking union for loss of wages inevitably resulting from such successful strike, then not only have collective bargaining agreements become empty shells but unions must resign themselves to an unending succession of reverses in their struggle for improved terms and conditions of employment.

The United States Court of Appeals made the following summary of the facts herein:

> "'The Board has found that the union caused a strike at the Lexington plant in Newark, New Jersey, in order to enforce its objections to the conduct of Lexington in utilizing the Imperial plant, located in the neighboring community of Union, New Jersey, for the operation of an additional shop near Newark, but beyond the territorial jurisdiction of Local 3 and not subject to organization by it.
>
> "The strike succeeded. Lexington caused the liquidation of the Imperial enterprise and the discharge of its employees, some of whom were later reemployed in the Lexington plant at Newark. Both the union and Lexington were found to have discriminated unlawfully against these Imperial employees by discharging them or causing their discharge in circumstances calculated to encourage union membership". (*Infra*, p. 22).

The United States Court of Appeals has evidenced no recognition that a problem of the "runaway shop", or the "partial runaway shop" exists today.

There appears to be no decision by a Federal Appellate Court which recognizes the momentous significance of the runaway shop problem in any case where a union struck in support of a provision of its valid collective bargaining agreement designed to prevent transfer of operations by the employer. Absent any decision specifically dealing with this problem, this case may well serve as a most unfortunate precedent insofar as the problem of maintaining high wage levels is concerned.

The only reported Appellate decision with facts comparable to those of the instant case is *N.L.R.B.* v. *Lewis*, 246 F. (2d) 886. In that case the Ninth Circuit, affirming an order of the N.L.R.B., held to be liable the *employer* who had transferred operations to a plant twelve miles away to avoid continuing to deal with the union which had jurisdiction of its original plant, and did not hold that labor union liable. The inevitable effect of the Court's

decision was the loss of jobs by the employees at the new plant; this loss of employment was regarded as incidental and was not dealt with. A most significant difference between the facts in *N.L.R.B.* v. *Lewis*, and those of the instant case is the collective bargaining agreement and the clause prohibiting transfer of operations in the instant case, and the absence of such clause in *Lewis*. It is the failure of such contractual clause prohibiting transfer to exculpate the union herein from liability for unfair labor practices that renders the instant decision a far more dangerous precedent than *Lewis* would have been had the Ninth Circuit's opinion been directed against the union rather than against the employer.

It is respectfully submitted that just as an area with a high water level urgently requires the reinforcement of dams which prevent a downflow of water to surrounding areas of low water level, so does an area with a high wage level require the reinforcement, through strike action if need be, of contractual clauses prohibiting transfer of operations to surrounding areas of lower wage level.

It is further respectfully submitted that when an employer breaches an anti-runaway shop clause in his collective bargaining agreement, and employs new employees in another area, and, perhaps, signs a new collective bargaining agreement, then the employer, the union, the employees of the old plant, the employees of the new plant, and the new union, if any, all are entitled to a decision settling the rights, duties, powers and liabilities of all parties therein. Such decision ought appropriately to be settled by this Court at this time.

2. Precedent established by thousands of remedial orders by the NLRB and the Federal Appellate Courts has been upset by the instant imposition by the Court of primary liability for back pay upon the union, the Court holding the employer contingently liable in the event that the union failed to make the employees whole.

Ever since the National Labor Relations Act was amended in 1947 to make unions as well as employers liable for unfair labor practices, the invariable practice of the NLRB, when it determined that both employer and union committed an unfair labor practice which resulted in the loss of employees' wages, has been to impose joint and several liability upon employer and union for the back pay. The invariable practice of all Federal Courts, whenever they affirmed the NLRB's determination that both employer and union committed such unfair labor practices, has been to uphold the NLRB's order imposing joint and several liability for back pay upon employer and union.

In the instant case, as in all other cases where the NLRB found that both employer and union committed unfair labor practices causing loss of wages, the Board imposed joint and several liability for back pay upon employer and union. The Third Circuit, while affirming the Board's finding that employer and union committed unfair labor practices causing loss of wages, took the unprecedent step of amending the Board's order for the purpose of making the union primarily liable, and the employer only contingently liable, for loss of wages to Imperial's employees resulting from the strike of Lexington's employees.

The Court's justification for this procedure was that the employer committed its unfair labor practice under coercion by the union, and that it discharged Imperial's employees only after it had filed its own unfair labor practice charge against the union (with reference to the Court's factual error in this connection, see *supra*, p. 9).

This ruling is directly contrary to the ruling of the Ninth Circuit in *N.L.R.B.* v. *Pinkerton's National Detective Agency, Inc.*, 202 F. (2d) 230, and to the ruling of the First Circuit in *N.L.R.B.* v. *Bull Insular Lines, Inc.*, 1956, 233 F. (2d) 318 and *N.L.R.B.* v. *Puerto Rico Steamship As-*

sociation, 1954, 211 F. (2d) 274, all of which hold that despite the fact that the employer acted under union coercion, the NLRB's ruling that employer and union were jointly and severally liable for back pay may not be set aside upon judicial review.

It is respectfully submitted that to permit the Court's ruling to stand could result in a procedural nightmare for the NLRB and the Federal Courts. From this time forward it would no longer be settled that both employer and union are responsible for the results of unfair labor practices committed by both parties. In each case the respective degrees of liability of both parties would be weighed and measured and argued on appeal. In each case a party who must admit having committed an unfair labor practice which resulted in loss of wages would nevertheless be encouraged to embark upon appellate litigation on the ground that he, although at fault, was less at fault than his co-respondent and should be held liable only if the NLRB does not succeed in collecting back pay from his co-respondent. The result could be comparable to what would happen in the courts if the Admiralty Rule relating to relative degrees of fault were suddenly applied to all of the automobile accident cases now in process of litigation.

3. The unprecedented decree herein ordering the employer and the union to suspend enforcement of the valid union-security clause of their collective bargaining agreement as against the former Imperial employees raises constitutional issues involving the Fifth Amendment.

The decree of the United States Court of Appeals for the Third Circuit provides, with respect to both Lexington and Local 3, that "the union-security provisions of any agreement in effect at the Lexington plant shall not be enforced as against any employee listed in Appendix A who may receive employment at the Lexington plant as a result of the operation of this Decision and Order for a

period of two years commencing with the date of such employment" (*Infra*, pp. 30, 32). Under this decree, if the last of the former Imperial employees accepts employment at Lexington, say, three years from now, the union-security provision of Local 3's agreement with Lexington would be suspended, in part, for a period of up to five years.

The decision and decree herein are the first reported case, it is believed, in which a Federal Court has stated that a valid union-security clause may not be—indeed must not be—given full force and effect. Under this decision, Local 3 remains legally obligated, of course, to represent these former Imperial employees and to process their grievances.

Conley v. *Gibson*, 1957, 355 U. S. 41;
Ford Motor Co. v. *Huffman*, 1953, 345 U. S. 330;
Syres v. *Local 23, Oil Workers Int'l Union*, 350 U. S. 892, reversing *per curiam*, 223 Fed. (2d) 739 (Fifth Cir., 1955).

The full extent of Local 3's duty to the former Imperial employees which Lexington has been required to hire remains uncharted. (See, generally Wellington "Union Democracy and Fair Representation", 67 Yale L. J. 1327 (1958).) As stated in *Steele* v. *Louisville & N.R.R.*, 1944, 323 U. S. 192, however "we think that the • • • Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom they legislate" (323 U. S. at 202).

Since the Court has not and cannot suspend the duties of Local 3 with respect to non-members for whom it bargains pursuant to its union-security contract with Lexington, it is respectfully submitted that this extraordinary decree deprives Local 3 of its contractual property rights without due process of law. Depending upon future decisional eluci-

dation shedding light upon the nature and extent of Local 3's duties with respect to the former Imperial employees and, to the extent that this decree serves as a precedent, the nature and extent of the obligation of labor unions to employees against whom they are forbidden to enforce the union-security clauses in their collective bargaining agreement, these decrees may now be, or will become violations of the Fifth Amendment, as aforesaid.

4. The United States Court of Appeals for the Third Circuit has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

(a) The Court failed entirely to review most of the evidence favorable to the union's position. In this connection it stated:

> "Evidence was introduced on both sides of this issue. We shall not analyze all of it. It will suffice to specify certain items which in our view show that the factual findings and conclusions of the trial examiner, as adopted by the Board, have an adequate evidentiary base. * * * These considerations persuade us that the Board's finding as to the object of the strike is supported by substantial evidence. While the items we have discussed are but part of a total record containing other evidence favorable to the union's position, the cited evidence is sufficient to sustain the Board's findings before a court, limited as we are in reviewing administrative fact findings" (*Infra*, pp. 22, 23).

The Court has thus clearly ruled that if "substantial evidence" supports the finding of the Board, the reviewing court must enforce the Board's order, regardless of the body of evidence contained in the record opposed to the Board's opinion. The Court has thus ignored the requirement of Section 10(e) of the National Labor Relations Act, as amended, that findings of the Board with respect to questions of fact must be "supported by substantial

evidence on the record *considered as a whole*" to be conclusive upon the reviewing court, and the Court has ignored the interpretations of Section 10(e) by this Court in line of cases beginning with *Universal Camera Corporation* v. *N.L.R.B.*, 1951, 340 U. S. 474.

(b) The Court, in its evaluation of the record, gave no consideration, as evidenced by its opinion, to the collective bargaining agreement and more particularly to clause 27, the anti-runaway shop clause therein, notwithstanding the fact that the union had argued throughout all the prior proceedings that the contract was the primary justification for its strike.

It is respectfully submitted that such flagrant disregard of a party's primary defense should not, in any proceeding, be condoned.

(c) The Court failed, in its opinion, to state whether Local 3's unfair labor practice was a violation of Section 8(b)(2) of the National Labor Relations Act, as amended, or of Section 8(b)(1)(A) thereof, or of both provisions of law, as found by the NLRB. In its brief and argument Local 3 discussed numerous decisions of this Court and of other Appellate Courts which, in its opinion, establish that Local 3's strike violated neither of the above Sections of the Act cited by the Board as the bases of its decision. Local 3 has thereby been deprived of its due opportunity to show this Court that the decision of the Third Circuit is directly contrary to decisions of this Court and of other Appellate Courts. Such judicial conduct, it is respectfully submitted, is unjustifiable.

(d) The Court's unprecedented imposition of novel and extraordinary remedial penalties upon Local 3, with relation to its liability for back pay and the suspension of its union-security clause, as aforesaid, are unjustifiable.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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NORMAN ROTHFELD.

Appendix A

(Opinion of United States Court of Appeals for the Third Circuit)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,176

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LEXINGTON ELECTRIC PRODUCTS CO., INC., IMPERIAL SWITCHBOARD, INC., and LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, And Its Agent, JULIUS HELFER,

Respondents.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued June 9, 1960.

Before: BIGGS, *Chief Judge*; and HASTIE and FORMAN, *Circuit Judges*.

OPINION OF THE COURT

(Filed September 29, 1960)

By HASTIE, *Circuit Judge*.

The National Labor Relations Board has found that a manufacturing corporation, Lexington Electric Products Co., and the union which represents its employees in the

Appendix A

New York City area, Local 3, International Brotherhood of Electric Workers, AFL-CIO, have committed unfair labor practices in connection with the liquidation of Imperial Switchboard, Inc., a corporation engaged in work similar to that of Lexington and found to be under the same top management and control. The Board has found that the union caused a strike at the Lexington plant in Newark, New Jersey, in order to enforce its objections to the conduct of Lexington in utilizing the Imperial plant, located in the neighboring community of Union, New Jersey, for the operation of an additional shop near Newark, but beyond the territorial jurisdiction of Local 3 and not subject to organization by it.

The strike succeeded. Lexington caused the liquidation of the Imperial enterprise and the discharge of its employees, some of whom were later reemployed in the Lexington plant at Newark. Both the union and Lexington were found to have discriminated unlawfully against these Imperial employees by discharging them or causing their discharge in circumstances calculated to encourage union membership.

Throughout this case the parties have contested the basic factual issue whether the object of the strike was to protect the employees of the Lexington plant against "farming out" work opportunities to another shop or, as the Board has found, to bring the Imperial employees within this local's jurisdiction. Evidence was introduced on both sides of this issue. We shall not analyze all of it. It will suffice to specify certain items which in our view show that the factual findings and conclusions of the trial examiner, as adopted by the Board, have an adequate evidentiary base.

Before the trial examiner, the business agent of Local 3 admitted that during negotiations which preceded the strike he told the controlling administrative officer of both Lexington and Imperial that it was not "fair to

operate a union shop and the non union" shop nearby. On the same point Lexington introduced testimony that the business agent had said that a "company which operated in New York City with a Local No. 3 agreement could not have another plant adjacent to Local No. 3 and in that plant contractual relations with another union. . . ." The record also shows that during the strike the business agent of Local 3 demanded as a condition of reopening the Lexington plant "that the Imperial men would have to be brought into Lexington and signed up under Local No. 3 contract". Indeed, one of the terms of the ultimate strike settlement was that the men who had worked in the Imperial plant were to be "picked up" by Lexington.

In addition, some doubt about the union's alleged primary concern with the removal of work from the Lexington plant is created by evidence that when the strike was called the orders which had been placed with Lexington and farmed out to Imperial represented work in excess of Lexington's Newark plant capacity. True, the union has argued that, even in this period of full employment, it was concerned primarily lest work be farmed out at some future less busy time. But we cannot say that the Board was unreasonable in refusing to believe that this mere possibility that Lexington workers might lose work in the indefinite future was the basic reason for the strike, particularly when countervailing evidence affirmatively showed expressions of concern by Local 3 officers that their jurisdiction was not recognized in a new neighboring unit serving the Lexington enterprise.

These considerations persuade us that the Board's finding as to the object of the strike is supported by substantial evidence. While the items we have discussed are but part of a total record containing other evidence favorable to the union's position, the cited evidence is sufficient to sustain the Board's findings before a court, limited as we are in reviewing administrative fact finding.

Entirely different questions are raised by certain provisions of the remedial order fashioned by the Board in this case. That order requires Lexington to employ the former Imperial workers in its plant as vacancies occur. An extraordinary feature of that requirement is a stipulation that a valid union security clause in Lexington's contract with Local 3 be suspended for two years in the cases of those former Imperial employees who are absorbed in the Lexington work force, since the Imperial operation itself was not covered by the union shop agreement. The union strongly objects to this stipulation.

As we have already indicated, the Board found, with justification on the record, that Lexington and Imperial were so related and under such common control that, for present purposes, they may be treated as a single employer. *Cf. N.L.R.B.* v. *Condenser Corp.*, 3d Cir., 1942, 128 F. 2d 67; *N.L.R.B.* v. *Concrete Haulers, Inc.*, 5th Cir., 1954, 212 F. 2d 477. Normally, an unfair termination of employment at Imperial because of nonmembership in a union would have been redressed by a requirement that the employees be restored to work status at Imperial free of any obligation to join the union. But here the union had made this impossible by insisting upon the closing of the Imperial plant In these circumstances the feasible remedy which most closely approximates the normal corrective is the remedy devised by the Board. We cannot say that such a solution of the problem is an unjust or inappropriate way of correcting the complaining union's own wrong. A remedy which is reasonably adapted to correct the injurious effects of an unfair labor practice and thus to effectuate the objectives and policies of the statute should be recognized as within administrative discretion and should not be disturbed by a reviewing court. *N.L.R.B. v. Seven-Up Bottling Co.*, 1953, 344 U. S. 344; *Virginia Electric & Power Co.* v. *N.L.R.B.*, 1943, 319 U. S. 533. We have such a remedy here.

Appendix A

A second feature of the remedy, one to which Lexington takes exception, is a requirement that the employer and the union be jointly and severally liable to make the Imperial employees whole for any loss of pay suffered as a result of the liquidation of Imperial. The employer recognizes that both the union and the employer may be, and normally are, held jointly and severally responsible for a wrongful discharge by the employer in response to the insistence of the union. *N.L.R.B.* v. *Acme Mattress Co.*, 7th Cir., 1951, 192 F. 2d 524; *N.L.R.B.* v. *Newspaper & Mail Deliverers Union*, 2d Cir., 1951, 192 F. 2d 654. However, this court has not hesitated to refuse to enforce a reinstatement and reimbursement order when the policies of the Act seemed to call for such a course. *N.L.R.B.* v. *Kingston Cake Co.*, 3d Cir., 206 F. 2d 604.

This case discloses special and unusual circumstances which in our view make it patently inequitable that the employer be more than secondarily responsible for back pay. This is not merely a case where the employer acted reluctantly in acceding to the union's demands. After its plant had been struck, Lexington resisted the union's demands to the point of actually filing a formal charge of unfair labor practice against the union with the National Labor Relations Board, asserting that the strike had the very illegal objective which the Board, in the present proceeding, has now found. At that time, however, the administrative authorities did not take any action against the union on the basis of Lexington's charge. Thus, it was only after unsuccessful invocation of the normal legal remedy against an unfair labor practice strike that the employer yielded to economic coercion.

These circumstances do not prevent the employer's coerced action in discharging the Imperial employees from being an unfair labor practice. *N.L.R.B.* v. *Imparato Stevedoring Corp.*, 3d Cir., 1957, 250 F. 2d 297. However, on the present facts it seems needlessly and pointlessly

harsh to make the employer jointly and severally, rather than secondarily, liable to the injured employees. Secondary liability on the part of the employer will fully protect the employees. Imposing joint primary liability upon this employer will not encourage other employers to resist union demands, since in this case the employer did resist to the full extent that could reasonably be expected. Rather, imposing primary liability solely upon the union will tend to discourage such coercion as proved effective here. In these special circumstances we conclude that the wronged employees will be fully protected and the policies of the act fully effectuated by imposing primary liability to the injured employees upon the union alone, and at the same time holding the employer liable to make the employees whole, should the union fail to do so.

Local 3 makes a different complaint about the breadth of the Board's proposed cease and desist order. That order in terms prohibits the union from attempting in the future to cause, not only Lexington, but also "any other employer" to commit such unfair labor practices as have been found in this case. Moreover, this broad prohibition is supplemented by the requirement that notices be posted "at all places where notices to stewards and members are customarily posted", without any indication that this requirement is limited to the plant of the employer involved in this suit.

The sole justification of so broad an order appears to be the opinion expressed in the decision of the Board that "in view of the nature of the unfair labor practices committed, the commission by the Respondents of similar and other unfair labor practices reasonably may be anticipated". Nothing is said about any prior misconduct of the union similar to that found in the present case. Moreover, there is no evidence that the present misconduct was part of a plan or scheme to be carried out against other employers in the future. It merely appears that the ex-

aminer's opinion, subsequently adopted by the Board, was that a union which will once do the sort of thing involved in this case is likely to do it again.

Heretofore, this court, in deference to the Board's expertise, has enforced similar orders even though the Board's judgment, that an unfair labor practice by a union in the case of one employer was likely to be repeated against another employer, had very little support in the record. *Eg., N.L.R.B.* v. *United Mine Workers, Dist. 2*, 3d Cir., 1953, 202 F. 2d 177. But *cf. N.L.R.B.* v. *Richards*, 3d Cir., 1959, 265 F. 2d 855. Recently, however, other courts of appeals have refused to enforce such broad orders in various situations where there has been no administrative finding of either similar prior misconduct or some comprehensive plan for similar wrongdoing in the future. *Morrison-Knudsen Co.* v. *N.L.R.B.*, 9th Cir., 1960, 276 F. 2d 63; *Local No. 636* v. *N.L.R.B.*, D. C. Cir., 1960, 278 F. 2d 858; *N.L.R.B.* v. *United Brotherhood of Carpenters*, 7th Cir., 1960, 276 F. 2d 694; *N.L.R.B.* v. *Local 926, Int. Union of Operating Engineers*, 5th Cir., 1959, 267 F. 2d 418. Then, while the present appeal was pending, the divergency of rulings of the courts of appeals in this area led the Supreme Court to consider the problem in *Communication Workers of America, AFL-CIO* v. *N.L.R.B.*, 1960, 362 U. S. 479. There the Court observed that the union was "not found to have engaged in violations against the employees of any employer other than" the telephone company immediately involved in that case, and that there was no significant evidence of "a generalized scheme against all telephone employers". Accordingly, the Court struck from the Board's order language, like that in the present case, restraining similar unfair labor practices against any other employer. We think it follows that the present cease and desist order must be modified in the same way by eliminating its injunction against the coercion of "any other employer". By the same token

the language requiring the posting of notices should be reworded to make it clear that it does not apply to places of business of employers not parties to this litigation.

We find no merit in any of the other objections which have been made to the enforcement of the Board's order.

The order of the Board will be modified in accordance with this opinion and, as thus modified, will be enforced.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Appendix B

(Decree of the United States Court of Appeals, for the Third Circuit)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,176

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LEXINGTON ELECTRIC PRODUCTS CO., INC., IMPERIAL SWITCHBOARD, INC., and LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, And Its Agent, JULIUS HELFER,

Respondents.

DECREE ENFORCING, AS MODIFIED, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: BIGGS, *Chief Judge*; and HASTIE and FORMAN, *Circuit Judges*.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated October 28, 1959. The Court heard argument of respective counsel on June 9, 1960, and has considered the briefs and transcript of record in this cause. On September 29, 1960, the Court being fully advised in the premises, handed down its opinion enforcing, as modified, the Board's said Order. In conformity therewith it is hereby

Appendix B

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Third Circuit that Respondents Lexington Electric Products Co. Inc. and Imperial Switchboard, Inc., their officers, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Encouraging membership in Local 3, International Brotherhood of Electrical Workers, AFL-CIO, or in any other labor organization of their employees, by discharging employees for lack of membership in that union or by discriminating in any other manner in regard to hire or tenure of employment or any term or condition thereof, except to the extent permitted by the proviso to Section 8 (a)(3) of the Act.

(2) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a)(3) of the National Labor Relations Act, as amended, (hereinafter called the Act); however, the union-security provisions of any agreement with Local 3, IBEW, AFL-CIO in effect at the Lexington plant shall not be enforced as against any employee listed in Appendix A who may receive employment at the Lexington plant as a result of the operation of this Decision and Order for a period of two years commencing with date of such employment.

(b) Take the following affirmative action which the Board has found will effectuate the policies of the Act:

Appendix B

(1) Offer to the employees listed in Appendix A immediate and full reinstatement to their former or substantially equivalent positions without prejudice to seniority or other rights and privileges in the manner set forth in the section of this Decision and Order entitled "The Remedy".

(2) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records or reports, and all other records necessary to determine the amount of back pay due under the terms of this Decision and Order.

(3) Post at its place of business at Baldwin Park, Newark, New Jersey, and at any other location that may be established at which the discriminatees herein are offered reinstatement, copies of the notices attached hereto marked "Appendix B" and "Appendix C". Copies of said notices, to be furnished by the Regional Director for the twenty-Second Region of the National Labor Relations Board, Newark, New Jersey, shall, after being duly signed by the Respondent Companies' respective representatives, be posted by them immediately upon receipt thereof and maintained for at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Companies to insure that said notices are not altered, defaced, or covered by any other material.

(4) Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree, what steps have been taken to comply herewith.

2. The Respondent, Local 3, International Brotherhood of Electrical Workers, AFL-CIO (hereinafter called Respondent Union), its officers, agents, representatives, successors, and assigns, and Julius Helfer, its agent, shall:

Appendix B

(a) Cease and desist from:

(1) Causing or attempting to cause Lexington Electric Products Co. Inc., and Imperial Switchboard, Inc. to discharge employees or in any other manner to discriminate against employees in violation of Section 8 (a)(3) of the Act.

(2) In any other manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, including the right to refrain from engaging in any or all the activities guaranteed thereunder, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by the proviso in Section 8 (a)(3) of the Act; however, the union-security provisions of any agreement in effect at the Lexington plant shall not be enforced as against any employee listed in Appendix A who may receive employment at the Lexington plant as a result of the operation of this Decision and Order for a period of two years commencing with the date of such employment.

(b) Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(1) Notify the Respondent Companies and the employees listed in Appendix A, in writing, that they have no objection to the employment of those employees by the Companies.

(2) Post at the business offices of Respondent Union copies of the notice attached hereto as "Appendix B". Copies of said notices, to be furnished by the Regional Director for the Twenty-Second Region of the National Labor Relations Board, Newark, New Jersey, shall, after being duly signed by Respondent Union's representative and Respondent Julius Helfer, be posted by the aforementioned Respondents immediately upon receipt thereof, and

be maintained for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by said Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(3) Promptly mail to said Regional Director signed copies of the notice marked "Appendix B" for posting by Respondent Companies as provided above.

(4) The Respondent Union and Respondent Helfer shall notify the aforesaid Regional Director, in writing, within ten (10) days from the date of this Decree, what steps they have taken to comply herewith.

3. The Respondent Companies and the Respondent Union shall take the following action which the Board has found will effectuate the policies of the Act:

Make whole the employees listed in Appendix A for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set forth in the section of the Decision and Order entitled "The Remedy", provided that primary liability for making the employees whole shall rest upon the Respondent Union, and the Respondent Companies shall be liable to make them whole only should the Respondent Union fail to do so.

By the Court

WILLIAM H. HASTIE
Circuit Judge

Dated: Dec. 9, 1960

APPENDIX A

JOSEPH CATENA

CLIFFORD COYLE, JR.

MICHAEL N. DUDAS

ROBERT ERICKSON

ACKBERT P. FERRANCE

ANTHONY GENANTONIO

JOSEPH KAPEC

EDWARD J. LESNIAK

HERBERT MERCURIO

RICHARD F. MEHASKY

WILLARD MOSIER

WILLIAM O'DONNELL

DUNNAR PETRINI

GUNNAR PRAZYCH

RICHARD W. PURCELL

ANTHONY J. RUZOCKA

IGNAZIO P. SANTINOCETO

ROBERT TINO

APPENDIX B

Notice to Members of This Union

AND

Employees of Lexington Electric Products Co. Inc. and Imperial Switchboard, Inc.

PURSUANT TO

A Decree of the United States Court of Appeals for the Third Circuit enforcing, as modified, an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

We will not cause, or attempt to cause, Lexington Electric Products Co. Inc., and Imperial Switchboard, Inc. to discharge employees or in any other manner discriminate in regard to hire, tenure of employment, or any term or condition of employment, except as authorized by Section 8(a)(3) of the National Labor Relations Act.

We will not in any other manner restrain or coerce employees of Lexington Electric Products Co. Inc., and Imperial Switchboard, Inc., in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the National Labor Relations Act.

Appendix B

We, the undersigned Union, will make Joseph Catena, Clifford Coyle, Jr., Michael N. Dudas, Robert Erickson, Ackbert J. Ferrance, Anthony Genantonio, Joseph Kapec, Edward J. Lesniak, Herbert Mercurio, Richard F. Mehasky, Willard Mosier, William O'Donnell, Dunnar Petrini, Gunnar Prazych, Richard W. Purcell, Anthony J. Ruzicka, Ignazio P. Santinoceta, and Robert Tino whole for any loss of pay suffered as a result of the discrimination against them.

We have no objection to the employment of the said employees by Lexington Electric Products Co. Inc., and Imperial Switchboard, Inc., and we request those concerns to offer them immediate and full reinstatement to their former or substantially equivalent position, without prejudice to seniority and other rights and privileges.

LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
(Labor Organization)

Dated..... By.....
(Representative) (Title)

Dated..... By.....
(JULIUS HELFER)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Appendix B

APPENDIX C

Notice to All Employees

pursuant to

A Decree of the United States Court of Appeals for the Third Circuit enforcing, as modified, an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We will not encourage membership in Local 3, International Brotherhood of Electrical Workers, AFL-CIO, or in any other labor organization of our employees, by discharging employees for lack of union membership or by discriminating in any other manner in regard to hire, tenure of employment, or any term or condition of employment, except as authorized by Section 8(a)(3) of the National Labor Relations Act.

We will not in any other manner interfere with, restrain, or coerce employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the National Labor Relations Act.

We will offer Joseph Catena, Clifford Coyle, Jr., Michael N. Dudas, Robert Erickson, Ackbert P. Ferrance, Anthony Genantonio, Joseph Kapec, Edward J. Lesniak, Herbert Mercurio, Richard F. Mohasky, Willard Mosier, William O'Donnell, Dunmar Petrini, Gunnar Prazych, Richard W. Purcell, Anthony J.

Ruzicka, Ignazio P. Santinoceto and Robert Tino immediate and full reinstatement to their former, or a substantially equivalent position, without prejudice to their seniority and other rights and privileges.

We will make Joseph Catena, Clifford Coyle, Jr., Michael N. Dudas, Robert Erickson, Ackbert P. Ferrance, Anthony Genantonio, Joseph Kapec, Edward J. Lesniak, Herbert Mercurio, Richard F. Mehasky, Willard Mosier, William O'Donnell, Dunnar Petrini, Gunnar Prazych, Richard W. Purcell, Anthony J. Ruzicka, Ignazio P. Santinoceto and Robert Tino whole for any loss of pay suffered as a result of the discrimination against them, in the event that Local 3, International Brotherhood of Electrical Workers, AFL-CIO fails to do so.

All our employees are free to become, remain, or refrain from becoming, members of any labor organization, except to the extent this right may be affected by an agreement in conformity with Section 8(a)(3) of the National Labor Relations Act.

LEXINGTON ELECTRIC PRODUCTS CO. INC.
(Employer)

By.....
(Representative) (Title)

Dated.....

IMPERIAL SWITCHBOARD, INC.
(Employer)

By.....
(Representative) (Title)

Dated.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

FILE COPY

FILED
MAR 1 1961
JAMES R. BROWNING, Clerk

No. 760

In the Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and its Agent, JULIUS HELFER, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, LEXINGTON ELECTRIC PRODUCTS CO., INC., and IMPERIAL SWITCHBOARD, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ARCHIBALD COX,
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ART ROTHMAN,
General Counsel,

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Associate General Counsel,

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 700

LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and its Agent, JULIUS HELFER, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, LEXINGTON ELECTRIC PRODUCTS CO., INC., and IMPERIAL SWITCHBOARD, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 21-28) is reported at 283 F. 2d 54. The decision and order of the National Labor Relations Board (R. 3a-17a)[1] are reported at 124 NLRB 1400.

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[1] "R." refers to the Joint Appendix filed with the court below.

JURISDICTION

The decision of the court of appeals was issued on September 29, 1960, and a decree was entered on December 9, 1960 (Pet. 21, 29). The petition for a writ of certiorari was filed on February 7, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the finding of the National Labor Relations Board that the union, in violation of Sections 8(b)(2) and (1)(A) of the National Labor Relations Act, caused the employer, in violation of Sections 8(a)(3) and (1), to discharge 18 employees because they were not members of, or represented by, the union.

2. Whether, under the special facts of this case, the court of appeals could properly modify the Board's order—which imposed a joint and several liability for back pay—to make the union primarily liable for reimbursing the discharged employees, and the employer, only secondarily liable.

3. Whether the Board acted within its authority under Section 10(c) of the Act, to provide such remedy "as will effectuate the policies of [the] Act," in exempting the employees discriminated against, for a period of two years following the date of reemployment, from the requirements of any union-security agreement which the union might have with the employer.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, 61 Stat. 136, as amended, are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> >
> > * * * *
> >
> > (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.
>
> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> > (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *;
> >
> > * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *.

* * * *

SEC. 10 * * *

* * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

STATEMENT

A. The Board's Findings of Fact

Respondent Lexington Electric Products Co., Inc., operates a plant in Newark, New Jersey, where it manufactures and assembles electrical equipment (R. 18a; 60a-61a). It employs about 145 employees who have been represented by petitioner Local 3 for over 20 years (R. 22a; 121a). The ownership and managerial control of Lexington are vested in Napoleon Tischler, who is in charge of the New York City sales office, and I. V. Cole, who exercises virtually complete authority over the manufacturing and production processes (R. 20a; 60a-61a, 100a).

In response to increasing business opportunities and in view of the Lexington plant's inability to maintain production at a level which would satisfy sales commitments, Cole, early in 1957, decided to establish another plant to which excess work could be directed (R. 20a-21a; 61a, 67a). Accordingly, in May or June 1957, Cole and four other persons formed respondent Imperial Switchboard, Inc., and located the plant at Union, New Jersey (R. 21a; 61a-62a, 63a-64a, 119a). Cole was the principal investor in Imperial, holding a 50 percent interest (R. 21a; 62a). None of the capital stock of Imperial was ever issued to investors (R. 21a; 62a, 166a-167a). Imperial operated only as an assembly plant (R. 22a; 65a-66a). Seventy-five percent of the work performed by Imperial came directly from Lexington; only 25 percent was acquired independently of Lexington, and some of that was attributable to Imperial's relationship with Lexington (R. 22a, 33a-34a; 167a-168a). Cole was the actual operating head of both companies and handled labor relations at both (R. 32a, 34a-35a; 61a, 65a, 111a-113a). Imperial had 18 rank-and-file employees at the time it shut down, as described below (R. 19a, 21a; 120a).

During July and August 1957, Helfer, Local 3's business representative, told Cole that Lexington employees were in fear of losing earnings as a result of operations at Imperial and that the creation of Imperial violated the collective bargaining agreement (R. 23a, 25a, 36a-37a; 122a-126a).[2] Helfer further

---

[2] Section 27 of the contract provided: "The employer agrees not to move its manufacturing plant or any machin-

told Cole, "[He] didn't think it would be fair to operate a union shop and the nonunion shop * * *" (R. 25a, 37a-38a; 128a). Cole replied that other interests were involved in Imperial, and therefore he could not summarily close the plant (R. 25a; 71a). As a result of Cole's refusal to close Imperial, Local 3 struck Lexington on September 24, 1957 (R. 24a; 90a).[3]

Earlier, on September 12, 1957, Local 3, aware that within its grant of geographical jurisdiction it could not properly enter the Imperial plant at Union, New Jersey, communicated with Local 1159, an IBEW sister local within whose jurisdiction the Imperial plant was located, and requested permission for Local 3 to represent the Imperial employees (R. 30a; 106-111a). Local 1159 denied this request (*ibid.*). Subsequently, Local 1159 was recognized by Imperial as the bargaining representative of a majority of its employees, many of these employees having been members of Local 1159 while working in other shops in the area (R. 23a-24a; 114a-117a).

Notwithstanding Imperial's recognition of Local 1159, Helfer contended that Local 3 would not tolerate the continued existence of Imperial as long as

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ery used in connection with the manufacturing of electrical products, etc. from the geographical confines of New York City during the life of this agreement." As a matter of fact, Lexington had not moved its plant and had not moved any machinery out of its plant (R. 37a; 66a).

[3] On October 2, 1957, Lexington filed a charge with the Board alleging that the Union's strike constituted a violation of Section 8(b)(4)(A) and (B) of the Act. These charges were dismissed (Pet. 25).

Local 3 was not the bargaining representative in that plant (R. 26a; 72a). Thus, at a meeting in late September 1957, attended by Cole, his assistant, Martin Tischler, Helfer, and the Lexington shop committee, Helfer declared that "Imperial could not exist unless merged and all employees covered by the Local 3 Contract" (R. 38a; 68a, 70a). At a meeting in October 1957, Helfer again stated his opposition to the continued existence of Imperial and demanded "that the Imperial men * * * be brought into Lexington and signed up under Local No. 3 contract" (R. 40a; 103a). And, at a strike settlement meeting, Helfer added that Local 3 would not tolerate, so close to a Local 3 plant, any other shop in which another union had jurisdiction (R. 29a-30a; 72a).

Moreover, on several occasions during the strike at Lexington Local 3 sent representatives to the Imperial plant in an attempt to persuade the employees there to accept employment either at Lexington or at other shops in which Local 3 was the bargaining representative (R. 41a; 154a-157a).[4] Although Local 3 stated its objective only as the retention of work at Lexington, shop steward Byers testified that the purpose of the strike would not have been satisfied merely by the return of the work, but that the strike would have continued until Imperial no longer remained in existence (R. 39a; 146a).

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[4] In the course of one such appeal, Carberry, a shop steward at Lexington, displayed literature describing benefits which were received as a result of Local 3's collective bargaining (R. 41a; 154a-157a).

On October 18, 1957, the Lexington strike was settled as a consequence of a meeting with a Lexington customer whose work was delayed by the dispute (R. 27a; 138a-141a, 158a-160a). The terms of the settlement, to which Cole acceded, were that Imperial was to be permanently closed, all work and orders were to be returned to Lexington, and the Lexington strikers were to be paid for all lost time (*ibid.*). Accordingly, Cole, who a week earlier had acquired all the other interests in Imperial, closed Imperial on October 20, 1957 (R. 28a; 74a-75a). All Imperial employees were discharged, although ultimately three were hired by Lexington (*ibid.*).

B. The Board's Conclusions and Order

On the foregoing facts, the Board concluded that the Imperial employees were discharged for not being members of, or represented by, Local 3, that the Union and Helfer violated Section 8(b)(2) and (1)(A) of the Act by causing their discharge for this reason, and that the Companies[5] violated Section 8(a)(3) and (1) of the Act by acceding to the discharge demands (R. 3a, 42a).

The Board's order required the Union and the Companies to cease and desist from violating the above sections of the Act (R. 6a-7a). Affirmatively, the order required the Companies to offer the employees reinstatement at the Imperial plant if it is reopened, and if not, to provide employment for them

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[5] The Board found that Lexington and Imperial constituted a single joint employer (R. 36a).

at the Lexington plant, dismissing, if necessary, employees hired since the date of the discrimination, and placing any employees for whom work is not immediately available on a preferential hiring list (R. 3a-6a, 7a). The order further directed the Companies and the Union, jointly and severally, to make the dischargees whole against losses suffered as a result of the discrimination against them, and to post the usual appropriate notices (R. 10a). Finally, the order provided, with respect to discriminatees employed by Lexington in compliance with the order, that, for a period of two years following the date of employment, such employees shall be free of the requirements of any agreement requiring membership in the Union as a condition of employment (R. 7a, 9a).

C. The Decision of the Court of Appeals

The court of appeals upheld the Board's unfair labor practice findings as supported by substantial evidence on the total record (Pet. 23), and enforced the Board's order with some modification.

The court specifically sanctioned the two-year suspension of the union-security clause insofar as those discriminatees who may be employed by Lexington are concerned, finding that it was a "remedy which is reasonably adapted to correct the injurious effects" of the unfair labor practices committed (Pet. 24). However, the court disapproved of the provision of the Board's order imposing joint and several liability upon both the Union and the Companies. Recognizing that such liability was appropriate in the usual case of a discharge occasioned by union insistence, the

court concluded: "This case discloses special and unusual circumstances which in our view make it patently inequitable that the employer be more than secondarily responsible for back pay." (Pet. 27.) In the court's view, the fact that Lexington had resisted the Union's efforts to the point of filing an unfair labor practice charge, and that no action was taken on the charge at that time, warranted modification of the Board's order to impose primary liability solely upon the Union and to make the Companies' liability only secondary (Pet. 27-28).

ARGUMENT

1. Under the doctrine of *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, the petition for certiorari was untimely filed. The opinion of the court, which contained its judgment (see Pet. 28), was entered on September 29, 1960 (Pet. 21). The petition for certiorari was not filed until February 7, 1961, which was more than 90 days later. Nor was the time for filing a petition extended by the fact that the court entered a decree on December 9, 1960 (Pet. 29), for that decree did not change any matter of substance or resolve any ambiguity in the decision of September 29. Compare Brief for the National Labor Relations Board in Opposition, p. 8, *Dallas General Drivers, Warehousemen and Helpers Local Union No. 475* v. *National Labor Relations Board*, No. 638, this Term.

2. As to the merits, petitioners misconceive the decision of the court below in contending that it bans a

strike in protest against a "partial runaway shop" and a breach of contract by the employer (Pet. 2, 11-13). The Board's finding, affirmed by the court below, is that the Union struck Lexington, not in support of legitimate economic objectives,[1] but rather to procure the discharge of the Imperial employees because they were not members of, or represented by, the Union (R. 41a; see R. 3a). Accordingly, petitioners' attack on the court's decision reduces itself to the question of whether there is substantial evidence to support the finding of unlawful motive. This issue does not warrant review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

Moreover, the record amply supports the conclusion that concern over union membership, and not over loss of orders, motivated the Union's action in this case. As shown above (pp. 5-7, *supra*), the Union told Cole that it was not "fair to operate a union shop and nonunion shop"; that "Imperial could not exist unless merged and all employees covered by the Local 3 contract"; and that, to settle the strike, "the Imperial men would have to be brought into Lexington and signed up under Local No. 3 contract." Union Steward Byers admitted that return of the work to Lexington would not have satisfied the strike objective, and that the strike would have continued until Imperial was out of business. Finally, the Union

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[1] The Board noted that Lexington did not, in any event, violate the contract, as it moved neither its plant nor its machinery, and that nothing in the contract precluded the opening of a new nearby facility (R. 37a).

struck Lexington only after it failed in its efforts to become the bargaining representative of the Imperial employees by having a sister local, which had jurisdiction in the Imperial area, relinquish its claim.[7]

3. Contrary to petitioners' contention (Pet. 13-15), the modification by the court of appeals of the Board order, so as to impose primary liability for back pay upon the Union and only secondary liability upon the Companies, does not upset long-established precedent. The court specifically recognized the propriety of imposing joint and several liability upon both the union and the employer in the typical case where an employer gives in to union pressure and illegally discharges employees. To the court, however, the instant case presented an additional element which did not exist in prior cases, namely, that Lexington filed unfair labor practice charges with the Board, which were dismissed (see footnote 3, *supra*, p. 6), prior to its capitulation to the Union's unlawful demands. As

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[7] *National Labor Relations Board* v. *Lewis*, 246 F. 2d 886 (C.A. 9), cited by petitioners (Pet. 12), is clearly distinguishable on its facts. The court there enforced a Board order, based upon findings that the Company violated Sections 8(a)(3), (4) and (5) of the Act by, *inter alia*, refusing to bargain with the certified union regarding a total move of business operations, physically moving its plant and setting up a "front" corporation in order to disregard the union, engaging in unlawful interrogation and surveillance of its employees, and refusing to bargain with the certified union at the new plant location. In short, *Lewis* involved a situation where the company's entire course of action, although occurring in the context of an economic move, was specifically designed to dissipate the majority status of the union.

the court stated, "[I]t was only after unsuccessful invocation of the normal legal remedy against an unfair labor practice strike that the employer yielded to economic coercion" (Pet. 25). In view of this special factor, the court was not unreasonable in departing from the usual rule, and its action in doing so presents no issue of general importance warranting review by this Court.

4. The provision of the Board's order, requiring that the dischargees, upon their employment at the Lexington plant, be afforded a period of two years before being subjected to any union-security agreement requiring membership in the Union as a condition of employment, was well "adapted to the situation which calls for redress." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348. As the court below noted (Pet. 24), normally "an unfair termination of employment at Imperial because of nonmembership in a union would have been redressed by a requirement that the employees be restored to work status at Imperial free of any obligation to join the Union. But here the union had made this impossible by insisting upon the closing of the Imperial plant." Accordingly, the Board had to provide for reemployment of the dischargees at the Lexington plant, while, at the same time, insuring that the Union could not, in turn, require that they become members under the union-security agreement that it had there. In short, without the suspension of the union-security provision, the Union would have been able to accomplish the very

purpose which had led to the commission of the original unfair labor practices (R. 4a-5a; 45a-46a).*

There is no substance to petitioners' contention that the suspension of the union-security agreement with respect to the discriminatees contravenes the due process clause of the Fifth Amendment (Pet. 3, 15-17). The cases cited in support of this contention stand only for the proposition that an exclusive bargaining agent is obligated to represent all employees in the bargaining unit fairly and without racial or hostile discrimination of any kind. This duty of fair representation, however, is not contingent upon the bargaining agent having a correlative right to require that the employees represented become members of the union. As shown by this Court's decision in *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.*, 335 U.S. 525, the due process clause erects no obstacle to a total ban on union security arrangements. It follows that the limited suspension here of such an arrangement likewise presents no constitutional problem.

* As the Board pointed out (R. 5a): "Of course, the discriminatees remain free to join the Respondent Union at any time if they so desire."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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